

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
M.C. ALLEN PRODUCTIONS)	File No. EB-00-IH-0392
)	NAL/Acct. No. 200132080055
Licensee of Station KMCA(AM))	
Shasta, ¹ California)	
Facility ID # 64414)	

FORFEITURE ORDER

Adopted: November 28, 2001

Released: November 30, 2001

By the Chief, Enforcement Bureau:

1. In this Forfeiture Order ("Order"), we find that M.C. Allen Productions ("Allen") has violated Section 301 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 301, and sections 73.1125(e), 73.1615 and 73.1620 of the Commission's rules, 47 C.F.R. § 73.1125(e), 73.1615 and 73.1620, in connection with its operation of Station KMCA(AM) ("KMCA"). Based on our review of the facts and circumstances and after considering Allen's response to our *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd 9505 (Enforcement Bureau 2001) ("NAL"), we conclude that Allen is liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

BACKGROUND

2. In *Application of State of Oregon*, 15 FCC Rcd 15456, 15458 n. 13 (2000) ("*State of Oregon*") (subsequent history omitted),² the Commission referred to the Enforcement Bureau the question whether KMCA's main studio location complied with section 73.1125(a) of the Commission's rules, 47 C.F.R. § 73.1125(a). After investigating the matter, we determined that KMCA had maintained its main studio at

¹ On July 13, 2001, the Commission's staff granted BL-20010612AHZ, thereby changing KMCA's community of license from Burney to Shasta, California.

² In that decision, the Commission reaffirmed the dismissal of an application whose proposed contour overlapped KMCA's licensed contour in violation of section 73.37(a) of the Commission's rules, 47 C.F.R. § 73.37(a). The Commission determined that dismissal was appropriate because the applicant neither had protected KMCA's licensed facilities in Burney nor requested a waiver of 47 C.F.R. § 73.37(a). The applicant had contended, *inter alia*, that there was no need to protect KMCA's licensed facilities because Allen had already relocated KMCA and its main studio out of Burney. The Commission observed that, notwithstanding Allen's alleged move, protection of the licensed facilities of KMCA was still appropriate in the event Allen found it impossible to construct in accordance with its permit, which allowed KMCA to construct a new AM station in Shasta, California. The Commission also noted that the applicant's allegations regarding KMCA's main studio did not justify a waiver of 47 C.F.R. § 73.37(a).

locations authorized by the Commission's rules.³ However, as explained in the *NAL*, it also appeared that Allen violated various statutory and rule provisions in its operation of KMCA.

3. At the outset, we observed in the *NAL* that Allen then held a license to operate KMCA as a nondirectional AM station in the community of Burney on 1450 kHz. However, prior to its most recent renewal on July 14, 1999, Allen had relocated KMCA to Shasta, a community some 55 miles to the southwest, adjacent to the larger community of Redding, California.⁴ Allen's only apparent authority for this move were permits that authorized Allen to construct a new nondirectional AM station in Shasta.⁵

4. Following renewal, Allen resumed broadcasting in Shasta, purportedly pursuant to program test authority.⁶ However, Allen did not file the required license application until November 5, 1999.⁷ Moreover, in that application, Allen reported that it had not fully met all the terms, conditions and obligations set forth in the permit.⁸ Among other things, the license application reflected that the overall height of the antenna differed from that authorized by the permit and that the tower was toploaded instead of being a standard non-toploaded tower. Shortly after filing the referenced license application, Allen obtained on December 15, 1999, special temporary authorization ("STA") to operate from a site different than the one referenced in its license application.⁹ Allen began broadcasting from this new site on December 20,

³ We found that Allen always maintained KMCA's main studio within the principal community contour of Station KRRX(FM), Burney, and thus remained in compliance with 47 C.F.R. § 73.1125(a)(2).

⁴ See letter from Mark C. Allen to Magalie Salas, Secretary, Federal Communications Commission, dated April 17, 1998. In that letter, Allen acknowledged that KMCA "went on the air for service" in Shasta on January 1, 1998 and had become an "established Business in the community." [sic] See also letters from Mark C. Allen to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated March 12, 2001 and April 9, 2001.

⁵ See File Nos. BP-19970903AA, granted June 12, 1998, and BMP-19980901AA, granted January 19, 1999. See also letters from Allen's president, Mark C. Allen, to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated March 12, 2001 and April 9, 2001; letter from Mark C. Allen to Magalie Salas, Secretary, Federal Communications Commission, dated April 17, 1998.

⁶ See letter from Mark C. Allen to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated April 9, 2001. Initially, it appeared that Allen had resumed broadcast operations in Shasta as early as July 14, 1999. However, as clarified by its response to the *NAL*, Allen resumed daytime broadcasting in September 1999. In any event, as explained *infra* at ¶ 8, such broadcasts occurred before Allen had authority to broadcast in Shasta.

⁷ See File No. BL-19991105AAZ, dismissed August 30, 2000.

⁸ See *id.*, Section II, Question 4.

⁹ See File No. BSTA-19991112ABW, granted December 15, 1999.

1999. Although its STA expired on May 30, 2000, Allen did not obtain additional STA. Nonetheless, Allen continued to broadcast as if it had such authority.¹⁰ Moreover, on or about February 20, 2001,¹¹ Allen commenced broadcasting (1460 kHz), purportedly in accordance with its modified permit (*see* File No. BMP-20000324AAT, granted August 30, 2000).¹² However, although the license application reflected that the station was an AM directional, there was no indication that Allen had complied with 47 C.F.R. § 73.1620(a)(4). That provision requires permittees of an AM station with a directional antenna system to submit a proof of performance and authorizes program tests only after issuance of staff approval. Finally, once Allen had abandoned Burney, it also ceased maintaining a telephone number in Burney or a toll-free number. In view of the above, the *NAL* cited Allen for apparent violations of 47 U.S.C. § 301 (License for radio communication or transmission of energy) and 47 C.F.R. §§ 73.1615 (Operation during modification of facilities), 73.1620 (Program tests) and 73.1125(e) (Station main studio location).

5. In its response to the *NAL*, Allen raises several arguments.¹³ First, Allen suggests that the Bureau exceeded its authority by inquiring into matters that were not specifically referred by the Commission in *State of Oregon*. Second, Allen objects “strenuously” to the *NAL*’s conclusion that KMCA’s operations were unauthorized, and it challenges our conclusion that the violations appeared intentional. Allen suggests that the construction permits granted by the staff authorized its change of transmitter site and community of license and that it broadcast on KMCA only during periods of program test authority and STA. Third, Allen claims that the *NAL* proposed a \$7,000 forfeiture for the failure to maintain a local telephone number even though the *NAL* characterized the violation as minor, and notwithstanding Commission precedent that assessed more modest forfeitures for the same violations.¹⁴ Allen suggests that imposition of the base amount for a main studio violation under the circumstances of its case is arbitrary and grossly excessive, in light of its “unblemished” record. Finally, Allen reports that, upon receipt of the *NAL*, it ceased broadcast operations on KMCA before receiving STA to resume broadcasting

¹⁰ See letter from Mark C. Allen to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated April 9, 2001. We note that Allen filed on June 5, 2000, a request for further STA. However, the staff ultimately denied that request on May 18, 2001, subsequent to the issuance of the *NAL*.

¹¹ The *NAL* at ¶ 3 erroneously states February 2000; the context makes clear that we meant February 2001.

¹² See BL-20010227ABW (dismissed May 18, 2001). See also letter from Mark C. Allen to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated April 9, 2001.

¹³ Allen’s counsel also makes several factual assertions as to Allen’s intent or beliefs, none of which are supported by an affidavit from a person with personal knowledge of the facts alleged or by any other reliable evidence. Hence, they will not be considered.

¹⁴ Allen cites, for example, *Rasa Communications Corp.*, Notice of Apparent Liability, 11 FCC Rcd 13243, 13246 (Mass Media Bureau 1996). In that case, the Mass Media Bureau proposed a forfeiture of \$2,000 for brief failures to maintain a local telephone number and the public file.

at its now licensed site.¹⁵ Allen concludes that we should cancel the forfeiture, or, alternatively, that we should impose only a nominal amount.

DISCUSSION

6. Section 301 of the Act, 47 U.S.C. § 301, prohibits radio operation “except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.” Section 73.1615 of the Commission’s rules, 47 C.F.R. § 73.1615, allows AM licensees that hold a permit to modify their facilities to discontinue operation or operate with temporary or reduced facilities for a period of no more than 30 days. To extend its authority beyond 30 days, the licensee must submit an informal request prior to the 30th day. Moreover, when the licensee holds a permit that authorizes both a change in frequencies and directional facilities, the licensee must request and obtain authority from the Commission prior to using any new installation authorized by the permit. Section 73.1620(a)(1) of the Commission’s rules, 47 C.F.R. § 73.1620(a)(1), authorizes the permittee of a non-directional AM station to commence program tests. However, program test authority is conditioned, *inter alia*, upon completion of construction in accordance with the terms of the permit. Moreover, section 73.1620(a)(4) of the Commission’s rules, 47 C.F.R. § 73.1620(a)(4), authorizes the permittee of a directional AM station to commence program tests, but only after certain additional provisos are met. Specifically, in addition to completion of construction in accordance with the terms of the permit, the permittee must submit its license application with a request for program test authority at least ten days “prior to the date on which it desires to commence program test operations.” Further, the applicant must submit a proof of performance containing exhibits required by section 73.186 of the Commission’s rules.¹⁶ Finally, a permittee may not commence program tests prior to issuance of staff approval. With respect to the main studio, section 73.1125(e) of the Commission’s rules, 47 C.F.R. § 73.1125(e), requires broadcast licensees to maintain a local telephone number in their community of license or a toll-free number.

7. Initially, we reject Allen’s argument that we had no authority to investigate and act upon matters in addition to the one referred by the Commission. Sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111 and 0.311, give the Enforcement Bureau primary responsibility for enforcing the Commission’s rules relative to broadcast operations. Our investigation into whether Allen operated KMCA in accordance with those rules involves nothing more than action within the scope of that authority. Further, nothing in the Commission’s Order limited the scope of the Enforcement Bureau’s authority to investigate and assess a forfeiture against Allen for violations.

8. After carefully considering all the facts and circumstances surrounding Allen’s operation of KMCA, we remain convinced that Allen broadcast over KMCA without authority over an extended period.

¹⁵ See BSTA-20010524AAP, granted May 25, 2001.

¹⁶ 47 C.F.R. § 73.186.

As admitted repeatedly by Allen,¹⁷ it ceased broadcasting from its licensed facilities in Burney well before its most recent license renewal. Subsequent to renewal (July 14, 1999), Allen resumed broadcast operations on KMCA from its construction permit site. Allen did so without complying with 47 C.F.R. § 73.1615 in that it failed to submit the appropriate request. Moreover, Allen failed to obtain program test authority. Contrary to 47 C.F.R. § 73.1620(a)(1), Allen commenced broadcasting on KMCA in September 1999, nearly two months before it filed the necessary license application, not the ten days allowed by the rule. *See* note 6, *supra*. Even then, Allen's license application reveals that Allen did not complete construction in accordance with its permit. Thus, prior to December 15, 1999, Allen never had authority to begin broadcast operations in Shasta. Allen's permits authorized construction of facilities there, not commencement of broadcast operations, and Allen never fulfilled the conditions necessary to authorize program tests. Likewise, subsequent to the expiration of STA, which it held between December 15, 1999, and May 30, 2000, Allen again continued to broadcast from its STA site even though it did not have authority to do so. Its June 5, 2000, request for STA remained merely a request, nothing more. In similar situations, we have observed that the mere filing of an application does not constitute authority to operate.¹⁸ Moreover, the filing of Allen's penultimate license application in February 2001, following partial completion of construction, conferred no right to resume broadcasting. The record reveals that Allen had not completed construction of its nighttime directional array, did not submit a proof of performance, and did not request or wait for staff approval before commencing broadcast operations. Thus, Allen had not fulfilled the requirements of 47 C.F.R. 73.1620(a)(4) and therefore did not have program test authority. In short, beginning in September 1999 and concluding with its cessation of broadcast operations following issuance of the *NAL*, Allen's operation of KMCA was not in accordance with its license or in accordance with any other grant of authority, except for the six-month period covered by the STA. Rather, Allen operated from an unauthorized location and, beginning in February 2001, operated on an unauthorized frequency. Finally, Allen did not maintain a local telephone number or a toll-free number in Burney, contrary to 47 C.F.R. § 73.1125(e), since its last renewal of license.

9. Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1),¹⁹ provides that any person who willfully or repeatedly fails to comply with the terms and conditions of his license, the Communications Act or the Commission's rules shall be liable for a forfeiture penalty. In this context, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules,²⁰ while "repeatedly" means more than once.²¹ After considering the record, including Allen's

¹⁷ *See* letters listed *supra* note 4.

¹⁸ *See KNFL, Inc.*, Forfeiture Order, 15 FCC Rcd 10286 (Enforcement Bureau), *recon. denied*, 15 FCC Rcd 25527 (2000); *WRHC Broadcasting Corp.*, Notice of Apparent Liability, 15 FCC Rcd 5551, 5553-54 (Enforcement Bureau 2000); *Southeast Telephone, Inc.*, Notice of Apparent Liability, 15 FCC Rcd 4222 (Enforcement Bureau 2000).

¹⁹ *See also* section 1.80(a)(1) and (2) of the Commission's rules, 47 C.F.R. § 1.80(a)(1) and (2).

²⁰ *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

response to the *NAL*, we conclude that Allen, for most of the time following renewal of license to the present, operated KMCA without authority.²² Allen commenced broadcasting without complying either with the requirements for operation during modification of facilities or for obtaining program test authority. Upon expiration of STA, Allen continued to broadcast even though the staff did not act favorably on its request to renew STA. Upon partial completion of construction of its new facilities, Allen commenced broadcast operations, again without qualifying for program test authority. In this regard, contrary to 47 C.F.R. § 73.1620(a)(4), Allen did not request or receive explicit staff approval. We thus conclude that Allen's violations with respect to unauthorized operations were both willful and repeated. Finally, we also conclude that Allen's failure to maintain an appropriate telephone number in Burney was both willful and repeated.

10. In assessing a forfeiture, we take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D). They include the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. The Commission's forfeiture guidelines currently establish base amounts of \$4,000 for operation at an unauthorized location, \$4,000 for operation on an unauthorized frequency, and \$7,000 for a violation of the main studio rule.²³ Thus, the total base amount is \$15,000. As for adjustments, after considering the entire record, we now believe that insufficient evidence exists to justify a conclusion that Allen's violations were intentional. There is simply nothing before us that shows that Allen knew that it was violating the rules but continued to do so despite that knowledge. Thus, we do not include any upward adjustment for either the unauthorized location or unauthorized frequency violations. Further, in mitigation, we find that Allen's main studio violation was relatively minor in nature.²⁴ Consequently, we do not assess the base amount for a main studio violation but include in the total forfeiture only a minor portion of the recommended base amount for a main studio rule violation, or \$2,000. We therefore reject Allen's charge that the amount assessed for the main studio rule violation is arbitrary or grossly excessive. Further, we reject Allen's contention that its record is unblemished, thereby warranting a reduction or cancellation of the forfeiture. As noted, Allen relocated KMCA from Burney to Shasta without authority prior to its last renewal. *See* ¶ 3, *supra*. Even though an intervening renewal prevents imposition of a forfeiture for all violations related to KMCA's unauthorized relocation,²⁵ we may still consider the facts in determining, among other things,

²¹ *See Hale Broadcasting Corp.*, 79 FCC 2d 169, 171 (1980).

²² We expect licensees to know and comply with the Commission's rules, and we will not excuse violations absent clear mitigating circumstances. *See KEOT, Inc.*, Forfeiture Order, 16 FCC Rcd 683 (Enforcement Bureau 2001).

²³ *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("Forfeiture Guidelines").

²⁴ *See Rasa Communications Corp.*, *supra* note 14.

²⁵ *See* 47 U.S.C. 503(b)(6).

whether the licensee has a history of overall compliance.²⁶ Finally, although Allen ceased broadcast operations upon receipt of the *NAL*, the Commission has long held that remedial action to correct a violation, while commendable, will generally not nullify a forfeiture penalty. *See Station KGVN, Inc.*, 42 FCC 2d 258, 259 (1973). On balance, we find that a \$10,000 forfeiture should be imposed.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act,²⁷ and sections 0.111, 0.311 and 1.80 of the Commission's rules,²⁸ M.C. Allen Productions FORFEIT to the United States the sum of ten thousand dollars (\$10,000) for: violating 47 U.S.C. § 301 and 47 C.F.R. §§ 73.1615 and 73.1620, regarding a licensee's operation during modification of facilities and a permittee's commencement of program tests; and for violating 47 C.F.R. § 73.1125(e) by failing to maintain a local or toll-free number for the community of Burney.

12. IT IS FURTHER ORDERED THAT, payment of the forfeiture shall be made in the manner provided for in 47 C.F.R. § 1.80, within thirty (30) days Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504 of the Act, 47 U.S.C. § 504. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the *NAL*/Acct. No. referenced above. Requests for payment of the full amount of this Forfeiture Order under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁹

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

²⁶ *See Enserch Corporation*, 15 FCC Rcd 13551, 13554 (2000). *See also Forfeiture Guidelines*, 12 FCC Rcd at 17103-04.

²⁷ 47 U.S.C. § 503(b).

²⁸ 47 C.F.R. §§ 0.111, 0.311, 1.80.

²⁹ *See* 47 C.F.R. § 1.1914.

14. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail Return Receipt Requested to: M.C. Allen Productions, 4531 Shannon Place, Redding, California 96001; with a copy to: Christopher D. Imlay, Esq., Booth, Freret, Imlay & Tepper, P.C., 5101 Wisconsin Avenue, N.W., Suite 307, Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau